

## CHAPTER 7

# METHODS AND MEANS OF WARFARE

### References

1. Hague Convention No. IV, 18 October 1907, Respecting the Laws and Customs of War on Land, T.S. 539, including the regulations thereto [hereinafter H. IV].
2. Hague Convention No. IX, 18 October 1907, Concerning Bombardment by Naval Forces in Time of War, 36 Stat. 2314 [hereinafter H. IX].
3. Geneva Convention, for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, August 12, 1949, 6 U.S.T. 3114, T.I.A.S. 3362, 75 U.N.T.S. 31 [hereinafter GWS].
4. Geneva Convention for the Amelioration of the Condition of Wounded, Sick, and Shipwrecked Members, August 12, 1949, 6 U.S.T. 3217, T.I.A.S. 3363, 75 U.S.T.S. 85 [hereinafter GWS Sea].
5. Geneva Convention, Relative to the Treatment of Prisoners of War, August 12, 1949, 6 U.S.T. 3316, T.I.A.S. 3364, 75 U.N.T.S. 135 [hereinafter GPW].
6. Geneva Convention, Relative to the Treatment of Civilian Persons in Time of War, August 12, 1949, 6 U.S.T. 3516, T.I.A.S. 3365, 75 U.N.T.S. 287 [hereinafter GC].
7. The 1977 Protocols Additional to the Geneva Conventions, December 12, 1977, 16 I.L.M. 1391, DA Pam 27-1-1 [hereinafter GP I & II].
8. Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous, or Other Gases, and of Bacteriological Methods of Warfare, June 17, 1925, 26 U.S.T. 571, 94 L.N.T.S. 65 [hereinafter 1925 Geneva Protocol].
9. Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction, January 13, 1993, 32 I.L.M. 800 [hereinafter 1993 CWC].
10. 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, May 14, 1954, 249 U.N.T.S. 216 [hereinafter 1954 Cultural Property Convention].
11. Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction, April 10, 1972, 26 U.S.T. 583 [hereinafter 1972 Biological Weapons Convention].
12. Convention on Prohibitions or Restrictions of the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects, October 10, 1980, 19 I.L.M. 1523 [hereinafter 1980 Conventional Weapons Treaty].
13. Dep't of the Army, Field Manual 27-10, The Law of Land Warfare (July 1956) [hereinafter FM 27-10].
14. Dep't of the Navy, Naval Warfare Publication 1-14M/U.S. Marine Corps MCPW 5-2.1, The Commander's Handbook on the Law of Naval Operations (October 1995) [hereinafter NWP 1-14M].

15. Dep't of the Air Force, Air Force Publication 110-31, International Law--The Conduct of Armed Conflict and Air Operations (19 November 1976) [hereinafter AFP 110-31].
16. Dep't of Defense Instruction 5000.1, Defense Acquisition (15 March 1996) [hereinafter DoD Instr. 5000.1].

## **I. LEGAL FRAMEWORK.**

- A. The Law of the Hague (ref. (1) and (2)). Regulates “methods and means” of warfare -- prohibitions against using certain weapons such as poison and humanitarian concerns such as warning the civilian population before a bombardment. The rules relating to the methods and means of warfare are primarily derived from articles 22 through 41 of the Regulations Respecting the Laws and Customs of War on Land [hereinafter HR] annexed to Hague Convention IV. (HR, art. 22-41.) Article 22 states that the means of injuring the enemy are not unlimited.
- B. Geneva Conventions of 1949 (ref. (3) - (6)). Protects “victims” of war such as wounded and sick, shipwrecked at sea, prisoners of war, and civilians.
- C. 1977 Geneva Protocols (ref. (7)). The U.S. has not ratified these treaties. Portions, however, do reflect state practice and legal obligations -- the key ingredients to customary international law.
  1. Motivated by International Committee of the Red Cross’ belief that the four Geneva Conventions and the Hague Regulations insufficiently covered certain areas of warfare in the conflicts following WW II, specifically aerial bombardments, protection of civilians, and wars of national liberation.
  2. As of October 1998:
    - a. 152 nations have become Parties to GP I.
    - b. 144 nations have become Parties to GP II
  3. New or expanded areas of definition and protection contained in Protocols include provisions for: medical aircraft, wounded and sick, prisoners of war, protections of the natural environment, works and installations containing dangerous forces, journalists, protections of civilians from indiscriminate attack, and legal review of weapons.

4. U.S. views these GP I articles as either customary international law or acceptable practice though not legally binding: 5 (appointment of protecting powers); 10 (equal protection of wounded, sick, and shipwrecked); 11 (guidelines for medical procedures); 12-34 (medical units, aircraft, ships, missing and dead persons); 35 (1)(2) (limiting methods and means of warfare); 37 (perfidy prohibitions); 38 (prohibition against improper use of protected emblems); 45 (prisoner of war presumption for those who participate in the hostilities); 51 (protection of the civilian population, except para. 6 -- reprisals); 52 (general protection of civilian objects); 54 (protection of objects indispensable to the survival of the civilian population); 57-60 (precautions in attack, undefended localities, and demilitarized zones); 62 (civil defense protection); 63 (civil defense in occupied territories); 70 (relief actions); 73-89 (treatment of persons in the power of a party to the conflict; women and children; and duties regarding implementation of GP I).
5. The U.S. specifically objects to articles 1(4) (GP I applicability to certain types of armed conflicts); 35(3) (environmental limitations on means and methods of warfare); 39(2) (use of enemy flags and insignia while engaging in attacks); 44 (combatants and prisoners of war (portions)); 47 (non-protection of mercenaries); 55 (protection of the natural environment) and 56 (protection of works and installations containing dangerous forces). See Michael J. Matheson, *The United States Position on the Relation of Customary International Law to the 1977 Protocols Additional to the 1949 Geneva Conventions*, 2 Am. U. J. Int'l & Pol'y 419, 420 (1987).

D. Treaties. The following treaties that limit specific aspects of warfare are another source of targeting guidance.

1. Gas (ref. (8) and (9)). Geneva Protocol of 1925 prohibits use in war of asphyxiating, poisonous, or other gases . . . U.S. reserves right to respond with chemical weapons to a chemical attack by other side. *But cf.* Chemical Weapons Convention (CWC), article I(1), which prohibits production, stockpiling, and use (even in retaliation). The U.S. ratified the CWC, April 1997. This ratification has had the practical effect of renouncing the right to respond with chemical weapons to a chemical weapon attack by the other side.

2. Cultural Property (ref. (10)). The 1954 Hague Cultural Property Convention prohibits targeting cultural property, and sets forth conditions when cultural property may be used by a defender or attacked.
  3. Biological Weapons (ref (11)). Biological weapons are prohibited by the 1925 Geneva Protocol. However, their use in retaliation, as well as their production, manufacture, and stockpiling are prohibited by the 1972 Biological Weapons Convention.
  4. Conventional Weapons (ref. (12)). The 1980 Conventional Weapons Treaty restricts or prohibits the use of certain weapons deemed to cause unnecessary suffering or to be indiscriminate: Protocol I – non-detectable fragments; Protocol II - mines, booby traps and other devices; Protocol III - incendiaries; and Protocol IV- laser weapons. The U.S. has ratified the treaty by ratifying Protocols I and II. The Senate is currently reviewing Protocols III and IV and amendments to Protocol II for its advice and consent to ratification. The treaty is often referred to as the UNCCW - United Nations Convention on Certain Conventional Weapons. As of 11 November 1998, 72 nations are Party to the Treaty (72 states party to Protocol I; 67 states party to Protocol II; 68 states party to Protocol III; 31 states party to Protocol IV.). Protocol I, II, III, and IV have entered into force. (Protocol IV entered into force on 30 July 1998 and amended Protocol II entered into force on 3 December 1998.)
- E. Regulations. Implementing targeting guidance for U.S. Armed Forces is found in respective service regulations. (FM 27-10 (Army), NWP 1-14M/FMFM 1-10 (Navy and Marine Corps), and AFP 110-31 (Air Force).)

## II. PRINCIPLES

### A. The Principles:

1. **Military Necessity**: may target those things which are not prohibited by LOW and whose targeting will produce a military advantage. **Military Objective**: persons, places, or objects that make an effective contribution to military action.
2. **Humanity or Unnecessary Suffering**: must minimize unnecessary suffering - incidental injury to people and collateral damage to property.

3. **Proportionality**: the loss of life and damage to property **incidental** to attacks must not be **excessive** in relation to the **concrete and direct** military advantage expected to be gained.
  4. **Discrimination or Distinction**: must discriminate or distinguish between combatants and non-combatants; military objectives and protected people/protected places.
- B. Principle of Military Necessity - That principle which justifies those measures not forbidden by international law which are indispensable for securing the complete submission of the enemy as soon as possible. (FM 27-10, para. 3.)
1. “Not forbidden.” Targeting of enemy personnel and property permitted unless otherwise prohibited by international law. This check on the application of military force, i.e., international law, is the distinction cited by Dr. Lieber in 1863. This differed from the 19<sup>th</sup> Century European view as stated below by Germany’s Bismarck:
 

Humanitarian claims such as the protection of men and goods can only be taken into consideration insofar as the nature of war permits.” See Dep’t of the Army, *International Law*, Dep’t of the Army Pamphlet 27-161-2, 12 (1962) [hereinafter DA Pam. 27-161-2].
  2. Indispensable for complete submission. In a limited war, the act must be indispensable to attain the limited objective. For example, in the Persian Gulf War, the UN mandate limited the coalition’s objective to forcing Iraq from Kuwait. This objective did not require the complete submission of all Iraqi forces.
  3. Criminal Defense. Military Necessity has been argued as a defense to law of war violations and has generally been rejected as a defense for acts forbidden by customary and conventional laws of war. Rationale: laws of war were crafted to include consideration of military necessity. Approach -- look to whether international law allows targeting of a person or property. Examples:
    - a. Protected Persons. Law generally prohibits the intentional targeting of protected persons under any circumstances. WW II Germans, under concept called “Kreigsrason,” argued that sometimes dire military circumstances allowed them to violate international law --

i.e., kill prisoners at Malmedy because they had no provisions for them and their retention would have jeopardized their attack.  
(Rejected as a valid defense.)

- b. Protected Places - The Rendulic Rule. Law typically allows destruction of civilian property, if military circumstances require such destruction. (FM 27-10, para. 56 and 58.) The circumstances requiring destruction of protected property are those of “urgent military necessity” as they appear to the commander at the time of the decision. See IX Nuremberg Military Tribunals, *Trials of War Criminals Before the Nuremberg Military Tribunals*, 1113 (1950). Charges that General Lothar Rendulic unlawfully destroyed civilian property via a “scorched earth” policy were dismissed by the Tribunal because “the conditions, as they appeared to the defendant at the time were sufficient upon which he could honestly conclude that urgent military necessity warranted the decision made.” Id. Current norms for protection (and destruction) of civilian property:

- (1) [Don’t destroy real or personal property of civilians] “except where such destruction is rendered absolutely necessary by military operations.” (GC, art. 53.)
- (2) “[F]orbidden . . . to destroy or seize the enemy’s property . . . unless demanded by the necessities of war.” (HR, art. 23g.)

C. Principle of Unnecessary Suffering or Humanity - “It is especially forbidden . . . to employ arms, projectiles or material calculated to cause unnecessary suffering.” (HR, art. 23e.) This concept also extends to unnecessary destruction of property.

1. Can’t use arms that are per se calculated to cause unnecessary suffering (e.g., projectiles filled with glass, irregular shaped bullets, dum-dum rounds, lances with barbed heads).
2. Can’t use otherwise lawful arms in a manner that causes unnecessary suffering (e.g., 2000 pound bomb instead of precision guided munitions against a military objective where civilians are nearby, used with the intent to cause civilian suffering).

D. Principle of Proportionality

1. The Test. The loss of life and damage to property incidental to attacks must not be excessive in relation to the concrete and direct military advantage expected to be gained. (FM 27-10, para. 41, change 1.)

The U.S. test is taken, in part, from Article 51(5)b of Protocol I. “An attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.”

2. Protocol I. Under GP I, Article 51 (*Protection of the civilian population*), paragraph 5(b) prohibits “indiscriminate attacks”, defined in part as an attack where incidental injury to civilians or incidental damage to civilian objects would be “excessive in relation to the concrete and direct military advantage anticipated.” Under GP I, Article 57 (*Precautions in the attack*), paragraph (2)(b) requires planners to cancel an attack in the same circumstances. The U.S. considers these provisions customary international law.
3. Incidental Injury and Collateral Damage. Unavoidable and unplanned damage to civilian personnel and property incurred while attacking a military objective. Incidental (a/k/a collateral) damage is not a violation of international law. While no law of war treaty defines this concept, its inherent lawfulness is implicit in treaties referencing the concept. As stated above, GP I, Article 51(5) describes indiscriminate attacks as those causing “incidental loss of civilian life . . . excessive . . . to . . . the military advantage anticipated.” *Id.* Caution, however, the law of proportionality still applies.
4. Judging Commanders. It may be a grave breach of GP I to launch an attack that a commander *knows* will cause excessive incidental damage in relation to the military advantage gained. The requirement is for a commander to act *reasonably*.
  - a. Those who plan or decide upon an attack, therefore, must take all reasonable steps to ensure not only that the objectives are identified as military objectives or defended places . . . but also that these objectives may be attacked without probable losses in lives and damage to property disproportionate to the military advantage anticipated. (FM 27-10, para. 41.)

- b. In judging a commander's actions one must look at the situation as the commander saw it in light of all circumstances. *See* A.P.V. Rogers, *Law on the Battlefield* 66 (1996) and discussion of the "Rendulic Rule", above, at para. B,3. But based on case law and modern applications, the test is not entirely subjective -- "reasonableness" seems to have an objectivity element as well. In this regard, two questions seem relevant. Did the commander reasonably gather information to determine whether the target was a military objective and that the incidental damage would not be disproportionate? Second, did the commander act reasonably based on the gathered information? Of course, factors such as time, available staff, and combat conditions affecting the commander must also factor into the analysis.
  - c. Example: Al Firdus Bunker. During the Persian Gulf War, planners identified this bunker as a military objective. Barbed wire surrounded the complex, which was camouflaged, and had armed sentries guarding its entrance and exit points. Unknown to coalition planners, however, Iraqi civilians used the shelter as nighttime sleeping quarters. The complex was bombed, resulting in 300 civilian casualties. Was there a violation of the law of war? No. Based on information gathered by coalition planners, the commander made a reasonable assessment that the target was a lawful military objective and that incidental damage would not outweigh the military advantage gained. Although the attack unfortunately resulted in numerous civilian deaths, (and that in hindsight, the attack might have been disproportionate to the military advantage gained -- had the attackers known of the civilians) there was no international law violation because the attackers, at the time of the attack, acted reasonably. *See* DEPARTMENT OF DEFENSE, CONDUCT OF THE PERSIAN GULF WAR, FINAL REPORT TO CONGRESS 615-616 (1992).
- E. Principle of Discrimination or Distinction. GP I prohibits "indiscriminate attacks." Under Article 51, paragraph 4, these are attacks that:
- a. are "not directed against a specific military objective", (e.g., SCUD missiles during Persian Gulf War);
  - b. "employ a method or means of combat the effects of which cannot be directed at a specified military objective", [e.g., might prohibit area bombing in certain populous areas, such as a bombardment "which



treats as a single military objective a number of clearly separated and distinct military objectives in a city, town, or village...”(GP I, art. 51, para. 5(a)); or

- c. “employ a method or means of combat the effects of which cannot be limited as required” by the protocol (e.g., release of dangerous forces - GP I, art. 56 or incidental effect excessive in relation to concrete and direct military advantage - GP I, art. 51, para. 5(b); and
- d. “consequently, in each case are of a nature to strike military objectives and civilians or civilian objects without distinction.” (*See*, A.P.V. Rodgers, *Law on the Battlefield*, 19-24 (1996).)

### III. TARGETS

A. Military Objectives. (FM 27-10, para. 40, and GP I, art. 52(2).) Combatants, defended places, and those objects which by their nature, location, purpose or use make an effective contribution to military action.

#### B. PERSONS

1. Combatants. Anyone engaging in hostilities in an armed conflict on behalf of a party to the conflict. Combatants are lawful targets unless “out of combat”

a. Lawful Combatants. Receive protections of Geneva Conventions, specifically, the GWS, GWS Sea, and GPW.

b. Geneva Convention Definition. (GPW, art. 4; GWS, art. 13.)

(1) Under Responsible Command,

(2) Distinctive Sign Recognizable at a Distance,

(3) Carry Arms Openly, and

(4) Abide by the Laws of War.

c. Protocol I Definition. Article 44(3) of GP I states that a belligerent attains combatant status by merely carrying his arms openly during each military engagement, and when visible to an adversary while deploying for an attack. GP I thus drops the requirement for a fixed recognizable sign. The U.S. believes this does not reflect customary

international law and diminishes the distinction between combatants and civilians, thus undercutting the effectiveness of humanitarian law.

- d. Unlawful combatants. May be treated as criminals under the domestic law of the captor. An unlawful combatant can be a civilian who is participating in the hostilities or a member of the armed forces who violates the laws of war.
2. Noncombatants. The law of war prohibits attacks on non-combatants.
- a. Civilians
    - (1) General Rule. Civilians and civilian property may not be the subject or sole object of a military attack. Civilians are persons who are not members of the enemy's armed forces; and who do not take part in the hostilities (GP I, art. 50 and 51).
    - (2) Indiscriminate Attacks. GP I provides for expanded protections of the civilian population from "indiscriminate" attacks. Indiscriminate attacks include those where the incidental loss of civilian life, or damage to civilian objects, would be excessive in relation to the concrete and direct military advantage anticipated. (GP I, art. 51 - except for para. 6, considered customary international law by U.S.)
    - (3) Warning Requirement. (FM 27-10, para. 43; see HR, art. 26.) General requirement to warn before a bombardment. Only applies if civilians are present. **Exception:** if it is an assault (any surprise attack or an attack where surprise is a key element). GP I, Article 57(2)(c), however, requires warning of civilians before an attack (not necessarily a bombardment), unless circumstances do not permit (this is considered customary international law by the U.S.).
  - b. Hors de Combat. Prohibition against attacking enemy personnel who are "out of combat." Protected persons:
    - (1) Prisoners of War. (GPW, art. 4, HR, art. 23c, d.)
      - (a) Surrender may be made by any means that communicates the intent to give up. No clear rule as to what constitutes a surrender. However, most agree surrender constitutes a

cessation of resistance and placement of one's self at the discretion of the captor.

(b) Onus on person or force surrendering to communicate intent to surrender.

(c) Captors must respect (not attack) and protect (care for) those who surrender--no reprisals.

(d) Protocol I. Expands definition of prisoners of war to include "combatants." Combatants include those who don't distinguish themselves from the civilian population except when carrying arms openly during an engagement and in the deployment immediately preceding the engagement; e.g., national liberation movements. (GP I, art. 44.) U.S. asserts that this definition does not reflect customary international law.

(2) Wounded and Sick in the Field and at Sea. (GWS, art. 12; GWS Sea, art. 12.) Those soldiers who have fallen by reason of sickness or wounds and who cease to fight are to be respected and protected. Civilians are included in definition of wounded and sick (who because of trauma, disease . . . are in need of medical assistance and care and who refrain from any act of hostility). (GP I, art. 8.) Shipwrecked members of the armed forces at sea are to be respected and protected. (GWS Sea, art. 12, NWP 1-14M, para. 11.6). Shipwrecked includes downed passengers/crews on aircraft, ships in peril, castaways.

(3) Parachutists (FM 27-10, supra, para. 30). Paratroopers are presumed to be on a military mission and therefore may be targeted. Parachutists who are crewmen of a disabled aircraft are presumed to be out of combat and may not be targeted unless it's apparent they are engaged on a hostile mission. Parachutists, according to GP I, Article 42, "shall be given the opportunity to surrender before being made the object of attack."

c. Medical Personnel. Considered out of combat if they are exclusively engaged in medical duties. (GWS, art. 24.) They may not be directly attacked. However, accidental killing or wounding of such personnel due to their proximity to military objectives "gives no just cause for complaint" (FM 27-10, para 225). Medical personnel include:

(1) Medical personnel of the armed forces. (GWS, art. 24.)

(a) Doctors, surgeons, nurses, chemists, stretcher bearers, medics, corpsman, and orderlies, etc., who are “exclusively engaged” in the direct care of the wounded and sick.

(b) Administrative staffs of medical units (drivers, generator operators, cooks, etc.).

(c) Chaplains.

(2) Auxiliary Medical Personnel of the Armed Forces. (GWS, art. 25)

To gain the GWS protection, they must have received “special training” and must be carrying out their medical duties when they come in contact with the enemy.

(3) Relief Societies. Personnel of National Red Cross Societies and other recognized relief Societies (GWS, art. 26). Personnel of relief societies of Neutral Countries (GWS, art. 27).

(4) Civilian Medical and Religious Personnel. Article 15 of GP I requires that civilian medical and religious personnel shall be respected and protected. They receive the benefits of the provisions of the Geneva Conventions and the Protocols concerning the protection and identification of medical personnel. All available help shall be given to civilian medical personnel when civilian services are disrupted due to combat.

d. Personnel Engaged in the Protection of Cultural Property. Article 17 of the 1954 Hague Cultural Property Convention established a duty to respect (not directly attack) persons engaged in the protection of cultural property. The regulations attached to the convention provide for specific positions as cultural protectors and for their identification.

e. Journalists. Given protection as “civilians” provided they take no action adversely affecting their status as civilians. (GP I, art. 79 - considered customary international law by U.S.).

## C. PLACES

1. Defended Places. (FM 27-10, paras. 39 & 40, change 1.) As a general rule, any place the enemy chooses to defend makes it subject to attack. Defended places include:
  - a. A fort or fortified place;
  - b. A place occupied by a combatant force or through which a force is passing; and
  - c. A city or town that is surrounded by defensive positions under circumstances that the city or town is indivisible from the defensive positions. See also, GP I, Article 51(5)(a), which seems to clarify this rule. Specifically, it prohibits bombardments which treat “as a single military objective a number of clearly separated and distinct military objectives located in a city, town, or village. . . .”
2. Undefended places. The attack or bombardment of towns, villages, dwellings, or buildings which are undefended is prohibited. (HR, art. 25.) An inhabited place may be declared an undefended place (and open for occupation) if the following criteria are met:
  - a. All combatants and mobile military equipment are removed;
  - b. No hostile use made of fixed military installations or establishments;
  - c. No acts of hostilities shall be committed by the authorities or by the population; and
  - d. No activities in support of military operations shall be undertaken (presence of enemy medical units, enemy sick and wounded, and enemy police forces are allowed). (FM 27-10, art. 39b, change 1.)
3. Natural environment. The environment cannot be the object of reprisals. In the course of normal military operations, care must be taken to protect the natural environment against long-term, widespread, and severe damage. (GP I, art. 55 - U.S. specifically objects to this article.)
4. Protected Areas. Hospital or safety zones may be established for the protection of the wounded and sick or civilians. (FM 27-10, para. 45.) Articles 8 and 11 of the 1954 Hague Cultural Property Convention provide that certain cultural sites may be designated in an “International Register of Cultural Property under Special Protections.” The Vatican

and art storage areas in Europe have been designated under the convention as “specially protected.” The U.S. asserts the special protection regime does not reflect customary international law.

#### D. PROPERTY

1. Military Objective. Objects--if their nature, use, location, or purpose makes an effective contribution to military action. (FM 27-10, para. 40, GP I, art. 52(2).) The destruction, capture or neutralization must offer a definite military advantage. There must be a nexus between the object and a “definite” advantage toward military operations. Examples: munitions factory, bridges, railroads.
2. Protected Property
  - a. Civilians. Prohibition against attacking civilians or civilian property. (FM 27-10, para. 246; GP I, art. 51(2).) Presumption of civilian property attaches to objects traditionally associated with civilian use (dwellings, school, etc.) (GP I, art. 52(3).)
  - b. Protection of Medical Units and Establishments - Hospitals. (FM 27-10, paras. 257 and 258; GWS art. 19).
    - (1) Fixed or mobile medical units shall be respected and protected. They shall not be intentionally attacked.
    - (2) Protection shall not cease, unless they are used to commit “acts harmful to the enemy.”
      - (a) Warning requirement before attacking a hospital that is committing “acts harmful to the enemy.”
      - (b) Reasonable time to comply with warning, before attack.
    - (3) When receiving fire from a hospital, there is no duty to warn before returning fire in self-defense. Example: Richmond Hills Hospital, Grenada.
    - (4) Captured medical facilities and supplies of the armed forces. (FM 27-10, para. 234).

- (a) Fixed facilities. May be used by captors, in cases of urgent military necessity, provided proper arrangements are made for the wounded and sick who are present.
  - (b) Mobile facilities. Captors may keep mobile medical facilities, provided they reserved for care of the wounded and sick.
  - (c) Medical Supplies. May not be destroyed.
- c. Medical Transport. Transports of the wounded and sick or of medical equipment shall not be attacked. (GWS, art. 35.) Under the Geneva Conventions of 1949, medical aircraft were protected from direct attack only if they flew in accordance with a previous agreement between the parties as to their route, time, and altitude. GP I extends further protection to medical aircraft flying over areas controlled by friendly forces. Under this regime, identified medical aircraft are to be respected, regardless of whether a prior agreement between the parties exist. (GP I, art. 25.) In “contact zones”, protection can only be effective by prior agreement; nevertheless medical aircraft “shall be respected after they have been recognized as such.” (GP I, art. 26 - considered customary international law by U.S..) Medical aircraft in areas controlled by an adverse party must have a prior agreement in order to gain protection. (GP I, art. 27.)
- d. Cultural Property. Prohibition against attacking cultural property. The 1954 Cultural Property Convention elaborates, but does not expand, the protections accorded cultural property found in other treaties (HR, art. 27; FM 27-10, para. 45, 57.) The convention has not been ratified by the U.S. (treaty is currently under review with a view toward ratification with minor understandings). (See GP I, art. 53, for similar prohibitions.) Cultural property includes buildings dedicated to religion, art, science, charitable purposes, historic monuments, hospitals, and places where the sick and wounded are collected.
  - (1) Misuse will subject them to attack.
  - (2) Enemy has duty to indicate presence of such buildings with visible and distinctive signs.
- 3. Works and Installations Containing Dangerous Forces. (GP I, art. 56, and GP II, art. 15.) The rules are not U.S. law but should be considered because of the pervasive international acceptance of GP I and II. Under

the protocols dams, dikes, and nuclear electrical generating stations shall not be attacked - even if they are military objectives - if the attack will cause the release of dangerous forces and cause “severe losses” among the civilian population. (U.S. objects to “severe loss” language as creating a different standard than customary proportionality test - “excessive” incidental injury or damage.)

- a. Military objectives that are nearby these potentially dangerous forces are also immune from attack if the attack may cause release of the forces (parties also have a duty to avoid locating military objectives near such locations).
- b. May attack works and installations containing dangerous forces only if they provide “significant and direct support” to military operations and attack is the only feasible way to terminate the support. The U.S. objects to this provision as creating a standard that differs from the customary definition of a military objective as an object that makes “an effective contribution to military action.”
- c. Parties may construct defensive weapons systems to protect works and installations containing dangerous forces. These weapons systems may not be attacked unless they are used for purposes other than protecting the installation.

- 4. Objects Indispensable to the Survival of the Civilian Population. Article 54 of GP I prohibits starvation as a method of warfare. It is prohibited to attack, destroy, remove, or render useless objects indispensable for survival of the civilian population - such as foodstuffs, crops, livestock, water installations, and irrigation works.

E. Protective Emblems (FM 27-10, para. 238.) Objects and personnel displaying emblems are presumed to be protected under Conventions. (GWS, art. 38.)

1. Medical and Religious Emblems

- a. Red Cross.
- b. Red Crescent.
- c. Lion and Sun.



- d. Red Star of David: Not mentioned in the 1949 Geneva Convention, but is protected as a matter of practice.

## 2. Cultural Property Emblems

- a. “A shield, consisting of a royal blue square, one of the angles of which forms the point of the shield and of a royal blue triangle above the square, the space on either side being taken up by a white triangle.” (1954 Cultural Property Convention, art. 16 and 17).
- b. Hague Convention No. IX Concerning Bombardment by Naval Forces in Time of War (art. 5). “[L]arge, stiff, rectangular panels divided diagonally into two colored triangular portions, the upper portion black, the lower portion white.”

- ## 3. Works and Installations Containing Dangerous Forces. Three bright orange circles, of similar size, placed on the same axis, the distance between each circle being one radius. (GP I, annex I, art. 16.)

# IV. WEAPONS

- A. “The rights of belligerents to adopt means of injuring the enemy is not unlimited.” (HR, art. 22.)
- B. Legal Review. All U.S. weapons and weapons systems must be reviewed by the service TJAG for legality under the law of war. (DoD Directive 5000.1, “Defense Acquisition,” of March 15, 1996, para. D2j., AR 27-53, and SECNAVINST 5711.8A.) A review occurs before the award of the engineering and manufacturing development contract and again before the award of the initial production contract. (DoD Directive 5000.1, para. D2j.) Legal review of new weapons required also under Article 36 of GP I.
  - 1. The Test. Is the acquisition and procurement of the weapon consistent with all applicable treaties, customary international law, and the law of armed conflict? (DoD Directive 5000.1, “Defense Acquisition,” of March 15, 1996, para. D2j.) In the TJAG reviews, the discussion will often focus on whether the suffering occasioned by the use of the weapon is needless, superfluous, or grossly disproportionate to the advantage gained by its use?
  - 2. Weapons may be illegal:

- a. Per se. Those weapons calculated to cause unnecessary suffering, determined by the “usage of states.” Examples: lances with barbed heads, irregular shaped bullets, projectiles filled with glass. (FM 27-10, para. 34.)
  - b. By improper use. Using an otherwise legal weapon in a manner to cause unnecessary suffering. Example: a conventional air strike against a military objective where civilians are nearby vs. use of a more precise targeting method that is equally available - if choice is made with intent to cause unnecessary suffering.
  - c. By agreement or prohibited by specific treaties. Example: certain land mines, booby traps, and laser weapons are prohibited under the Protocols to the 1980 Conventional Weapons Treaty.
- C. Small Arms Projectiles. Must not be exploding or expanding projectiles. The Declaration of St. Petersburg of 1868 prohibits exploding rounds of less than 400 grams (14 ounces). Prohibited by late 19<sup>th</sup> century treaties (of which U.S. was never a party). U.S. practice, however, accedes to this prohibition as being customary international law. State practice is to use jacketed small arms ammunition (which reduces bullet expansion on impact).
1. Hollow point ammunition. Typically, this is semi-jacketed ammunition that is designed to expand dramatically upon impact. This ammunition is prohibited for use in armed conflict by customary international and the treaties mentioned above. There are situations, however, where use of this ammunition is lawful because its use will significantly reduce collateral damage to noncombatants and protected property (hostage rescue, aircraft security).
  2. High Velocity Small Caliber Arms
    - a. Early controversy about M-16 causing unnecessary suffering.
    - b. “Matchking” ammunition. Has a hollow tip--but is not expansive on impact. Tip is designed to enhance accuracy only and does not cause unnecessary suffering.
  3. Sniper rifles, .50 caliber machine guns, and shotguns. Much “mythology” exists about the lawfulness of these weapon systems.

Bottom line: they are lawful weapons, although rules of engagement (policy and tactics) may limit their use.

4. Superfluous Injury and Unnecessary Suffering Project: (SirUS): An attempt by the ICRC to bring objectivity to the review of legality of various weapons systems. The SirUS project attempts to use casualty survival rates off the battlefield as well as the seriousness of the inflicted injury as the criteria for determining if a weapon causes unnecessary suffering. The U.S. position is that the project is inherently flawed because of its data base of casualty figures is mostly based upon wounds inflicted in domestic disturbances, civil wars, from antipersonnel mines and from bullets of undetermined type.

D. Fragmentation (FM 27-10, para 34.)

1. Legal unless used in an illegal manner (on a protected target or in a manner calculated to cause unnecessary suffering).
2. Unlawful if fragments are undetectable by X-ray (Protocol I, 1980 Conventional Weapons Treaty).

E. Landmines and Booby Traps. Lawful if properly used, however, international process underway to outlaw all antipersonnel land mines.

1. Indiscriminate. Primary legal concern: indiscriminate use that endangers civilian population. Articles 4 and 5, Protocol II of the 1980 Conventional Weapons Treaty restricts placement of mines and booby traps in areas of “civilian concentration”, when combat between ground forces is not on-going or imminent.
  - a. Remotely delivered mines (those planted by air, artillery etc.). Only used against military objectives; and then so only if their location can be accurately recorded or if they are self-neutralizing.
  - b. Non-remotely delivered mines, booby traps, and other devices. Can’t be used in towns or cities or other places where concentrations of civilians are present, unless:
    - (1) They are placed in the vicinity of a military objective under the control of an adverse party; or

(2) Measures are in place to protect civilians from their effects (posting of signs etc.).

2. Booby Traps. Definition: A device designed to kill or maim an unsuspecting person who disturbs an apparently harmless object or performs a normally safe act. Protocol II of the 1980 Conventional Weapons Treaty contains specific guidelines on the use of booby-traps in Article 7:

Without prejudice to the rules of international law applicable in armed conflict relating to treachery and perfidy, it is prohibited in all circumstances to use booby-traps and other devices which in any way attached or associated with:

- (a) internationally recognized protective emblems, signs or signals;
- (b) sick, wounded or dead persons;
- (c) burial or cremation sites or graves;
- (d) medical facilities, medical equipment, medical supplies or transportation;
- (e) children's toys or other portable objects or products specifically designed for the feeding, health, hygiene, clothing or education of children;
- (f) food or drink;
- (g) kitchen utensils or appliances except in military establishments;
- (h) objects clearly of a religious nature;
- (i) historic monuments, works of art or places of worship which constitute the cultural or spiritual heritage of peoples;
- (j) animals or their carcasses

The above list is a useful "laundry list" for the operational law attorney to use when analyzing the legality of the use of a booby-trap. There is one important caveat to the above list. Sub-paragraph 1(f) of article 7 prohibits the use of booby-traps against "food or drink." Food and drink are not defined under the protocol, and if interpreted broadly, could include such viable military targets as supply depots and logistical caches. Consequently, it was imperative to implement a reservation to the Protocol which recognized that such legitimate military targets as supply depots and logistical caches were permissible targets against which to employ booby-traps. The reservation clarifies the fact that stocks of food and drink if judged by the United States to be of potential military utility, will not be accorded special or protected status.

3. Amended Protocol II (Mines Protocol). Amended Protocol II was ratified by the United States on 24 May 1999. (1) Expands the scope of the original Protocol to include internal armed conflicts. (2) Requires that all remotely delivered anti-personnel landmines (APL) be equipped

with self-destruct devices and backup self-deactivation features. (3) Requires that all non-remotely delivered APL not equipped with such devices (“Dumb Mines”) be used within controlled, marked, and monitored minefields. (Falls short of Presidents APL policy statement of 16 May 1996 that prohibited U.S. military use of “Dumb” APL, except in the Korean Peninsula and in training. (4) Requires that all APL be detectable using available technology. (5) Requires that the party laying mines assume responsibility to ensure against their irresponsible or indiscriminate use. Provides for means to enforce compliance. In his letter of Transmittal, the President emphasizes his continued commitment to the elimination of all APL.

- a. Amended Protocol II also clarifies the use of the M18 Claymore “mine” when used in the tripwire mode. Claymore may be used in the tripwire mode if:
  - (a) No longer then 72 hours
  - (b) It is located in the immediate proximity of the military unit that emplaced them
  - (c) Area is monitored by military personnel to ensure civilians stay out of the area.
4. U.S. policy on anti-personnel land mines. U.S. forces may no longer employ “dumb” (those that do not self-destruct or self-neutralize) anti-personnel land mines, according to a 16 May 1996 policy statement issued by the President. *See* Presidential Decision Directive 54. Exceptions to this policy:
  - a. Use of “dumb” mines on the Korean Peninsula to defend against and armed attack across the DMZ; and
  - b. Use of “dumb” mines for training purposes.
5. Ottawa Process. Initiated by the Canadian Foreign Minister. One hundred nations and assorted NGO's met in Oslo, Norway in September 1997 to draft the Convention on the Prohibition of the Use, Stockpiling, Production, and Transfer of Anti-Personnel Mines (APL) and on Their Destruction. Better known as the **Ottawa treaty or Process**. The Convention was signed in Ottawa, Canada in December 1997. The Convention entered into force on 1 March 1999. As of March 2000, 94

nations had ratified the Convention. Although the U.S. joined the Process in September of 1997, it withdrew when other countries would not allow exceptions for the use of APL mines in Korea and other uses of smart APL. Many of the United States' allies are signatories of Ottawa (including Canada, Britain, Germany and Australia) which raises significant issues concerning interoperability in multi-national operations.

6. U.S. Developments. On 17 September 1997, the President announced the following U.S. initiatives in regards to anti-personnel land mines:
  - a. Develop alternatives to APL by the year 2003; field them in South Korea by 2006.
  - b. Appointed a Presidential advisor on land mines.
  - c. Pursue a ban on APL through the U.N. Conference on Disarmament.
  - d. Increase demining programs.

F. Incendiaries. (FM 27-10, para. 36.) Examples: Napalm, flame-throwers, tracer rounds, and white phosphorous. None of these are illegal *per se* or illegal by treaty. The only U.S. policy guidance is found in paragraph 36 of FM 27-10 which warns that they should “not be used in such a way as to cause unnecessary suffering.” (See also para 6-7, AFP 110-31.)

1. Napalm and Flamethrowers. Designed for use against armored vehicles, bunkers, and built-up emplacements.
2. White phosphorous. Designed for igniting flammable targets such as fuel, supplies, and ammunition and for use as a smoke agent. White phosphorous (Willy Pete) artillery and mortar ammunition is often used to mark targets for aerial bombardment.
3. Protocol III of the 1980 Conventional Weapons Convention. Prohibits use of air-delivered incendiary weapons on military objectives located within concentrations of civilians. Has not been ratified by the U.S. The U.S. is currently considering ratifying the protocol - with a reservation that incendiary weapons may be used within areas of civilian concentrations, if their use will result in fewer civilian casualties. For example: the use of incendiary weapons against a chemical munitions factory in a city could cause fewer incidental civilian casualties.

Conventional explosives would probably disperse the chemicals, where incendiary munitions would burn up the chemicals.

G. Lasers. U.S. Policy (announced by SECDEF in Sep. 95) prohibits use of lasers specifically designed, as their sole combat function or as one of their combat functions, to cause permanent blindness to unenhanced vision. Recognizes that collateral or incidental may occur as the result of legitimate military use of lasers (rangefinding, targeting). This policy mirrors that found in Protocol IV of the 1980 Conventional Weapons Treaty (this protocol has not yet been ratified by U.S.). The Senate is reviewing the protocol for its advice and consent for ratification.

H. Chemical Weapons. (FM 27-10, para. 37.) Poison has been outlawed for thousands of years. Considered a treacherous means of warfare. Problem -- once unleashed it is hard to control. (HR, art. 23a.)

1. The 1925 Geneva Protocol. (FM 27-10, para 38, change 1.) Applies to all international armed conflicts.

a. Prohibits use of lethal, incapacitating, and biological agents. Protocol prohibits use of “asphyxiating, poisonous, or other gases and all analogous liquids, materials or devices. . . .”

b. The U.S. considers the 1925 Geneva Protocol as applying to **both** lethal and incapacitating chemical agents.

c. Incapacitating Agents: Those chemical agents producing symptoms that persist for hours or even days after exposure to the agent has terminated. U.S. views riot control agents as having a “transient” effect—and thus are NOT incapacitating agents. Therefore, their use in war is not prohibited by the treaty. (Other nations disagree with interpretation.) There are, however, policy limitations that are discussed below.

d. Under the Geneva Protocol of 1925 the U.S. reserved the right to use lethal or incapacitating gases if the other side uses them first. (FM 27-10, para. 38b, change 1.) Presidential approval required for use. (E.O. 11850, 40 Fed. Reg. 16187 (1975); FM 27-10, para. 38c, change 1.) **HOWEVER THE U.S. RATIFIED THE CHEMICAL WEAPONS CONVENTION (CWC) IN 1997. THE CWC DOES NOT ALLOW THIS “SECOND” USE.**

- e. Riot Control Agents. U.S. has an understanding to the Treaty that these are not prohibited.
- 2. 1993 Chemical Weapons Convention (CWC) (ref. 9). This treaty was ratified by U.S. and came into force in April 1997.
  - a. Provisions (twenty four articles).
    - (1) Article I. Parties agree to never develop, produce, stockpile, transfer, use, or engage in military preparations to use chemical weapons. Retaliatory use (second use) not allowed; significant departure from 1925 Geneva Protocol. Requires destruction of chemical stockpiles. Each party agrees not to use Riot Control Agents (RCAs) as a “method of warfare.”
    - (2) Article II. Definitions of chemical weapons, toxic chemical, RCA, and purposes not prohibited by the convention.
    - (3) Article III. Requires parties to declare stocks of chemical weapons and facilities they possess.
    - (4) Articles IV and V. Procedures for destruction and verification, including routine on-site inspections.
    - (5) Article VIII. Establishes the Organization for the Prohibition of Chemical Weapons (OPWC).
    - (6) Article IX. Establishes “challenge inspection,” a short notice inspection in response to another party’s allegation of non-compliance.
- 3. Riot Control Agents (RCA). U.S. RCA Policy is a two part test. The U.S. policy on RCAs during international armed conflict is found in Executive Order 11850. U.S. policy regarding the use of RCA's in Military Operations Other Than War is described in CJCSI 3110.07A.
  - a. Executive Order 11850 applies to use of Riot Control Agents and Herbicides; requires Presidential approval before first use in an armed conflict. (However, see paragraph 3.c. below, concerning the 1993 Chemical Weapons Convention’s prohibition against the use of RCA as a “method of warfare.”)



- (1) Riot Control Agents: renounces first use in armed conflicts except in defensive military modes to save lives such as:
    - (a) Controlling riots;
    - (b) Dispersing civilians where the enemy uses them to mask or screen an attack;
    - (c) Rescue missions for downed pilots, escaping PWs, etc.; and
    - (d) For police actions in our rear areas.
  - (2) Oleoresin Capsicum Pepper Spray (OC) a/k/a Cayenne Pepper Spray: U.S. classifies OC as a Riot Control Agent. (DAJA-IO, Information Paper of 15 August 1996, Use of Oleoresin Capsicum (OC) Pepper Spray and other Riot Control Agents (RCAs); DAJA-IO Memo of 20 September 1994, Subject: Request for Legal Review - Use of Oleoresin Capsicum Pepper Spray for Law Enforcement Purposes; CJCS Memo of 1 July 1994, Subject: Use of Riot Control Agents.)
- b. CJCSI 3110.07A applies to RCA use during MOOTW operations. The authorization for RCA use is at the SECDEF or CINC level. 3110.07A states the United States is not restricted by the chemical Weapons Convention in its use of RCAs, including against combatants who are a party to a conflict, in any of the following cases:
- (1) The conduct of peacetime military operations within an area of ongoing armed conflict when the United States is not a party to the conflict.
  - (2) Consensual peacekeeping operations when the use of force is authorized by the receiving state including operations pursuant to Chapter VI of the UN charter.
  - (3) Peacekeeping operations when force is authorized by the Security Council under Chapter VII of the UN charter.
- c. RCA Controversy. Convention prohibits RCA use as “method of warfare.” “Method of warfare” may be interpreted to include any actions that involve combatants - including traditional hostage

rescue/SAR missions and human shield scenarios previously allowed by E.O. 11850.

- (1) The rationale for the prohibition - we do not want to give states the opportunity for subterfuge. Keep all chemical equipment off the battlefield, even if it is supposedly only for use with RCA. Secondly, we do not want an appearance problem - with combatants confusing RCA equipment as equipment intended for chemical warfare. E.O. 11850 is still in effect and RCA can be used in certain defensive modes with presidential authority. However, any use in which “combatants” may be involved will most likely not be approved
- (2) The Senate’s resolution of advice and consent for ratification to the CWC (S. Exec. Res. 75 - Senate Report, S3373 of 24 April 1997, section 2- conditions, (26) - riot control agents) required that the President must certify that the U.S. is not restricted by the CWC in its use of riot control agents, including the use against “combatants” in any of the following cases:
  - (a) When the U.S. is not a party to the conflict
  - (b) In consensual (Chapter VI, UN Charter) peacekeeping, and
  - (c) In Chapter VII (UN Charter) peacekeeping.
- (3) The implementation section of the resolution requires that the President not modify E.O. 11850. (*see* S. Exec Res. 75, section 2 (26)(b), s3378)
- (4) The Presidents certification document of 25 April 1997 states that “the United States is not restricted by the convention in its use of riot control agents in various peacetime and peacekeeping operations. These are situations in which the U.S. is not engaged in the use of force of a scope, duration, and intensity that would trigger the laws of war with respect to U.S. forces.”
- (5) Thus, during peacekeeping missions (such as Bosnia, Somalia, Rwanda and Haiti) it appears U.S. policy will maintain that we are not party to the conflict for as long as possible. Therefore RCA would be available for all purposes under E.O. 11850. However, in armed conflicts (such as Desert Storm, Panama, and Grenada) it

is unlikely that the NCA will approve the use of RCA in situations where “combatants” are involved due to the CWC’s prohibition on the use of RCA as a “method of warfare.” (Thus, use of RCA unlikely in the CSAR and the human shield situations used as examples of defensive modes under E.O. 11850 .)

- I. Herbicides. E.O. 11850 renounces first use in armed conflicts, except for domestic uses and to control vegetation around defensive areas. (e.g., Agent Orange in Vietnam.)
- J. Biological. The 1925 Geneva Protocol prohibits bacteriological methods of warfare. The 1972 Biological Weapons Convention (ref. 11) supplements the 1925 Geneva Protocol and prohibits the production, stockpiling, and use of biological and toxin weapons. U.S. renounced all use of biological and toxin weapons.
- K. Nuclear Weapons. (FM 27-10, para. 35.) Not prohibited by international law. On 8 July 1996, the International Court of Justice (ICJ) issued an advisory opinion that “There is in neither customary nor international law any comprehensive and universal prohibition of the threat or use of nuclear weapons.” However, by a split vote, the ICJ also found that “The threat or use of nuclear weapons would generally be contrary to the rules of international law applicable in armed conflict.” The Court stated that it could not definitively conclude whether the threat or use of nuclear weapons would be lawful or unlawful in an extreme circumstance of self defense, in which the very survival of the state would be at stake. (35 I.L.M. 809 (1996).)

## V. TACTICS

- A. Psychological operations. Gulf War - U.S. PSYOPS leaflet program - PSYOPS units distributed over 29 million leaflets to Iraqi forces. The themes of the leaflets were the “futility of resistance; inevitability of defeat; surrender; desertion and defection; abandonment of equipment; and blaming the war on Saddam Hussein.” It was estimated that nearly 98% of all Iraqi prisoners acknowledged having seen a leaflet; 88% said they believed the message; and 70% said the leaflets affected their decision to surrender.” Adolph, *PSYOP: The Gulf War Force Multiplier*, Army Magazine 16 (December 1992).

B. Ruses. (FM 27-10, para. 48). Injuring the enemy by legitimate deception (abiding by the law of war--actions are in good faith). Examples of Ruses.

1. Naval Tactics. A common naval tactic is to rig disguised vessels or dummy ships, e.g., to make warships appear as merchant vessels. Some examples follow:

World War I - Germany: Germany often fitted her armed raiders with dummy funnels and deck cargoes and false bulwarks. The German raider Kormoran passed itself off as a Dutch merchant when approached by the Australian cruiser Sydney. Once close enough to open fire she hoisted German colors and fired, sinking Sydney with all hands. See C. John Colombos, *The International Law of the Sea* 454-55 (1962).

World War II - Britain: British Q-ship program during WW II. The British took merchant vessels and outfitted them with concealed armaments and a cadre of Royal Navy crewmen disguised as merchant mariners. When spotted by a surfaced U-boat, the disguised merchant would allow the U-boat to fire on them, then once in range, the merchant would hoist the British battle ensign and engage the U-boat. The British sank 12 U-boats by this method. This tactic caused the Germans to shift from surfaced gun attacks to submerged torpedo attacks. LCDR Mary T. Hall, *False Colors and Dummy Ships: The Use of Ruse in Naval Warfare*, Nav. War. Coll. Rev., Summer 1989, at 60.

2. Land Warfare. Creation of fictitious units by planting false information, putting up dummy installations, false radio transmissions, using a small force to simulate a large unit. (FM 27-10, para. 51.) Some examples follow:

World War II - Allies: The classic example of this ruse was the Allied Operation Fortitude prior to the D-Day landings in 1944. The Allies, through the use of false radio transmissions and false references in bona fide messages, created a fictitious First U.S. Army Group, supposedly commanded by General Patton, located in Kent, England, across the English Channel from Calais. The desire was to mislead the Germans to believe the cross-Channel invasion would be there, instead of Normandy. The ruse was largely successful. John Keegan, *THE SECOND WORLD WAR* 373-79 (1989).

Gulf War - Coalition: Coalition forces, specifically XVIII Airborne Corps and VII Corps, used deception cells to create the impression that they were going to attack near the Kuwaiti boot heel, as opposed to the "left hook" strategy actually implemented. XVIII Airborne Corps set up "Forward Operating Base Weasel" near the boot heel, consisting of a phony network of camps manned by several dozen soldiers. Using portable radio equipment, cued by computers, phony radio messages were passed between fictitious headquarters. In addition, smoke generators and loudspeakers playing tape recorded tank and truck noises were used, as were inflatable Humvees and helicopters. Rick Atkinson, *CRUSADE*, 331-33 (1993).

3. Use of Enemy Property. Enemy property may be used to deceive under the following conditions:
  - a. Uniforms. Combatants may wear enemy uniforms but cannot fight in them. Note, however, that military personnel not wearing their uniform lose their PW status if captured and risk being treated as spies

(FM 27-10, para. 54, 74; NWP 1-14M, para. 12.5.3; AFP 110-31, 8-6.)

World War II - Germany: The most celebrated incident involving the use of enemy uniforms was the Otto Skorzeny trial arising from activities during the Battle of Bulge. Otto Skorzeny was brigade commander of the 150<sup>th</sup> SS Panzer Brigade. Several of his men were captured in U.S. uniforms, their mission being to secure three critical bridges in advance of the German attack. 18 of Skorzeny's men were executed as spies following the battle. Following the war, ten of Skorzeny's officers, as well as Skorzeny himself, were accused of the improper use of enemy uniforms, among other charges. All were acquitted. The evidence did not show that they actually fought in the uniforms, consistent with their instructions. The case generally stands for the proposition that it is only the fighting in the enemy uniform that violates the law of war. (DA Pam 27-161-2 at 54.)

(1) For listing of examples of the use of enemy uniforms see W. Hays Parks, *Air War and the Law of War*, 32 A.F. L. Rev. 1, 77-78 (1990). For an argument against any use of the enemy's uniform see Valentine Jobst III, *Is the Wearing of the Enemy's Uniform a Violation of the Laws of War?*, 35 Am. J. Int'l L. 435 (1941).

- b. Colors. The U.S. position regarding the use of enemy flags is consistent with its practice regarding uniforms, i.e., the U.S. interprets the "improper use" of a national flag (HR, art. 23(f).) to permit the use of national colors and insignia of enemy as a ruse as long as they are not employed during actual combat (FM 27-10, para. 54; NWP 1-14M, para 12.5.). Note the Protocol I position on this issue in paragraph (d) below.
- c. Equipment. Must remove all enemy insignia in order to fight with it. Captured supplies: may seize and use if state property. Private transportation, arms, and ammunition may be seized, but must be restored and compensation fixed when peace is made. (HR, art. 53).
- d. Protocol I. GP I, Article 39(2) prohibits virtually all use of these enemy items. (*see* NPW 1-14M, para 12.5.3.) Article 39 prohibits the use in an armed conflict of enemy flags, emblems, uniforms, or insignia while engaging in attacks or "to shield, favour, protect or impede military operations." The U.S. does not consider this article to be reflective of customary law. This article, however, expressly does not apply to naval warfare, thus the customary rule that naval vessels may fly enemy colors, but must hoist true colors prior to an attack, lives on. (GP I, art 39(3); NWP 1-14M, para. 12.5.1.)

C. Use of Property. (*See*, Elyce Santere, *From Confiscation to Contingency Contracting: Property Acquisition on or Near the Battlefield*, 124 Mil. L.

Rev. 111 (1989).) Confiscation - permanent taking without compensation; Seizure - taking with payment or return after the armed conflict; Requisition - appropriation of private property by occupying force with compensation as soon as possible; Contribution - a form of taxation under occupation law.

D. Treachery and Perfidy. Prohibited under the law of war. (FM 27-10, para. 50; HR. art. 23b.) Perfidy involves injuring the enemy by his adherence to the law of war (actions are in bad faith).

1. Condemnation. Condemnation of perfidy is an ancient precept of the LOW - derived from principle of chivalry. Perfidy degrades the protections and mutual restraints developed in the mutual interest of all Parties, combatants, and civilians. In practice, combatants find it difficult to respect protected persons and objects if experience causes them to believe or suspect that the adversaries are abusing their claim to protection under the LOW to gain a military advantage. Thus, the prohibition is directly related to the protection of war victims. Practice of perfidy also inhibits restoration of peace. (Michael Bothe, et. al., *NEW RULES FOR VICTIMS OF ARMED CONFLICTS*, 202 (1982); FM 27-10, para. 50.)
2. Feigning and Misuse. Distinguish feigning from misuse. Feigning is treachery that results in killing, wounding, or capture of the enemy. Misuse is an act of treachery resulting in some other advantage to the enemy. Note that in order to be a violation of GP I, Article 37 the feigning of surrender or an intent to negotiate under a flag of truce must result in a killing, capture, or surrender of the enemy. Simple misuse of a flag of truce, not necessarily resulting in one of those consequences is, nonetheless, a violation of Article 38 of Protocol I, which the U.S. also considers customary law. An example of such misuse would be the use of a flag of truce to gain time for retreats or reinforcements. Morris Greenspan, *THE MODERN LAW OF LAND Warfare* 320-21 (1959). Article 38 is analogous to the Hague IV Regulation prohibiting the improper use of a flag of truce, art 23(f).
3. Protocol I. According to GP I, Article 37(1), the **killing, wounding, or capture via** “[a]cts inviting the confidence of an adversary to lead him to believe that he is entitled to, or is obliged to accord, protection under the rules of international law applicable in armed conflict, with intent to betray that confidence [are perfidious, thus prohibited acts].” (U.S. considers customary law.) Article 37(1) does not prohibit perfidy per se,

only certain perfidious acts that result in killing, wounding, or capturing, although it comes very close. The ICRC could not gain support for an absolute ban on perfidy at diplomatic conference. (Bothe, *supra*, at 203.) Article 37 also refers only to confidence in international law (LOW), not moral obligations. The latter viewed as too abstract by certain delegations. (*Id.* at 204-05.) Note, however, that the U.S. view includes breaches of moral, as well as legal obligation as being a violation, citing the broadcasting of an announcement to the enemy that an armistice had been agreed upon when it had not as being treacherous. (FM 27-10, para 50.)

4. Feigning incapacitation by wounds/sickness. (GP I, art. 37(1)(b).) Whiteman says HR, Article 23b also prohibits this, e.g. if shamming wounds and then attacking approaching soldier. Marjorie M. Whiteman, Dep't of State, 10 *Digest of International Law* 390 (1968); NWP 1-14M, para. 12.7.
5. Feigning surrender or the intent to negotiate under a flag of truce. (GP I, Art 37(1)(a).)
  - a. Falklands War - British: During the Battle for Goose Green, some Argentinean soldiers raised a white flag. A British lieutenant and 2 soldiers went forward to accept what they thought was a surrender. They were killed by enemy fire. The incident was disputed. Apparently, one group of Argentines was attempting to surrender, but not another group. The Argentinean conduct was clearly treachery if the British soldiers were killed by those raising the white flag, but it was not treacherous if they were killed by other Argentineans either unaware of the white flag, or not wishing to surrender. This incident emphasizes the rule that the white flag is an indication of a desire to negotiate only and that its hoister has the burden to come forward. *See* Major Robert D. Higginbotham, *Case Studies in the Law of Land Warfare II: The Campaign in the Falklands*, Mil. L. Rev., Oct. 1984, at 49.
  - b. Gulf War - Battle of Khafji incident was not a perfidious act. Media speculated that Iraqi tanks with turrets pointed aft, then turning forward when action began was perfidious act. DOD Report to Congress rejected that observation, stating that the reversed turret is not a recognized symbol of surrender *per se*. "Some tactical confusion may have occurred, since Coalition ground forces were

operating under a defensive posture at that time, and were to engage Iraqi forces only on a clear indication of hostile intent, or some hostile act.” Dep’t of Defense, *Final Report to Congress: Conduct of the Persian Gulf War* 621 (1992).

- c. Gulf War - On one occasion, however, Iraqi forces did apparently engage in perfidious behavior. In a situation analogous to the Falklands War scenario above, Iraqi soldiers waved a white flag and also laid down their arms. As Saudi forces advanced to accept the surrender, they took fire from Iraqis hidden in buildings on either side of street. *Id.*
- d. Gulf War - On another occasion an Iraqi officer approached Coalition force with hands up indicating his intent to surrender. Upon nearing the Coalition forces he drew a concealed pistol, fired, and was killed. *Id.*
- 6. Feigning civilian, noncombatant status. “Attacking enemy forces while posing as a civilian puts all civilians at hazard.” (GP I, art 37(1)(c); NWP 1-14M, para. 12.7.)
- 7. Feigning protected status by using UN, neutral, or nations not party to the conflict’s signs, emblems, or uniforms. (GP I, art 37(1)(d).)
  - a. As an example, on 26 May 1995, Bosnian Serb commandos dressed in uniforms, flak jackets, helmets, weapons of the French, drove up to French position on a Sarajevo bridge in an APC with UN emblems. French forces thought all was normal. The commandos, however, then proceeded to capture French Peacekeepers without firing a shot. Joel Brand, *French Units Attack Serbs in Sarajevo*, Wash. Post, May 28, 1995, at A1.
  - b. As in the case of the misuse of the flag of truce, misuse of a UN emblem which does not result in a killing, capture, or surrender, is nonetheless, a violation of Art 38, GP I. Note, however, that this prohibition only applies if the UN force is not an actual combatant force, a condition that has only arisen on one occasion: the Korean War. Michael Bothe, *et. al.*, NEW RULES FOR VICTIMS OF ARMED CONFLICTS 206 (1982).
- 8. Misuse of Red Cross, Red crescent, cultural property symbol.



- a. Designed to reinforce/reaffirm HR, Article 23f.
  - b. GWS requires that wounded & sick, hospitals, medical vehicles, and in some cases, medical aircraft be respected and protected. Protection lost if committing acts harmful to enemy. As an example, during the Grenada Invasion, U.S. aircraft took fire from the Richmond Hills Hospital, and consequently engaged it. (DA Pam 27-161-2, p. 53, n. 61.)
  - c. Cultural property symbols include 1954 Hague Cultural Property Convention, Roerich Pact, 1907 Hague Conventions symbol. (Bothe, *supra*, at 209.)
9. Misuse of internationally recognized distress signals, e.g., ICAO, IMCO distress signals.
- E. Assassination. Hiring assassins, putting a price on the enemy's head, and offering rewards for an enemy "dead or alive" is prohibited. (FM 27-10, para 31; E.O. 12333.) Targeting military leadership, however, is not assassination. See W. Hays Parks, *Memorandum of Law: Executive Order 12333 and Assassination*, Army Law. Dec. 1989, at 4.
- F. Espionage. (FM 27-10, para. 75; GP I, art. 46.) Acting clandestinely (or on false pretenses) to obtain information for transmission back to their side. Gathering intelligence while in uniform is not espionage.
1. Espionage is not a law of war violation.
  2. No protection, however, under Geneva Conventions for acts of espionage.
  3. Tried under the laws of the capturing nation. E.g., Art. 106, UCMJ.
  4. Reaching friendly lines immunizes spy for past espionage activities. Therefore, upon later capture as a lawful combatant, past spy cannot be tried for past espionage.
- G. Reprisals. (FM 27-10, para 497.) An otherwise illegal act done in response to a prior illegal act by the enemy. The purpose of a reprisal is to get the enemy to adhere to the law of war.
1. Reprisals are authorized if the following requirements are met:

- a. It is timely;
  - b. It is responsive to enemy's act;
  - c. It must first attempt a lesser form of redress; and
  - d. It must be proportional.
2. Prisoners of war and persons "in your control" can not be objects of reprisals. Protocol I prohibits reprisals against numerous targets such as the entire civilian population, civilian property, cultural property, objects indispensable to the survival of the civilian population (food, livestock, drinking water), the natural environment, installations containing dangerous forces (dams, dikes, nuclear power plants) (GP I, arts. 51-56).
  3. U.S. policy is that a reprisal may be ordered only at the highest levels (NCA).

H. Rules of Engagement. Defined: Directives issued by competent superior authority that delineate the circumstances and limitations under which U.S. forces will initiate and/or continue engagement with other forces.

1. ROE are drafted in part based upon the LOW. Drafted considering LOW, political policy, public opinion and military operational constraints. ROE are usually more restrictive than what the LOW would allow.
2. Targeting rules are often incorporated within ROE for a given operation.
3. CJCS Standing ROE (CJCS Instruction 3121.01A of 15 Jan 00):  
Guidance as to course of action in specific situations. "Inherent Right of Self Defense" for both individual and the unit is the foundation of document.

## VI. CONCLUSION

- A. Principles
- B. Targets
- C. Weapons
- D. Tactics